Office-Supreme Court, U.S.
FILED
MAY 12 1981
ALEXANDER L. STEVAS
CLERK

80-1899

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee Of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, As Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, As Indenture Trustee; HENRY CROWN, *et al*; UNITED STATES OF AMERICA, And The INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Date: May 12, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

In the opinion of petitioner Railway Labor Executives' Association (RLEA),* the following questions are presented by this petition:

1. Did the United States District Court, sitting as a reorganization court for a railroad under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, have the discretion both to determine on its own that the Trustee's plan of reorganization was without merit, and to refuse to transmit that plan to the Interstate Commerce Commission as it was required to do by Bankruptcy Rule 8-303?

2. Did the United States District Court, sitting as a railroad reorganization court under 11 U.S.C. §205, have the jurisdiction to order the liquidation of the debtor?

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* Petitioner RLEA is a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees. The member organizations of RLEA are listed in Appendix G, hereto. While many parties have appeared before the District Court in these proceedings, petitioner has named as respondents only those parties who have appeared on brief in the Seventh Circuit proceedings in this case, as well as both the United States of America and the Interstate Commerce Commission because of their involvement in the reorganization proceedings and the issues presented herein.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and to reverse the decision of that court which was entered on February 11, 1981, affirming orders of the United States District Court for the Northern District of Illinois [hereinafter, "reorganization court"] refusing to transmit a plan or reorganization to the Interstate Commerce

Commission [hereinafter, "ICC" or "Commission"], and ordering the liquidation of the Chicago, Rock Island & Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"], a railroad in reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205.

OPINIONS BELOW

The twelve page per curiam order of the United States Court of Appeals for the Seventh Circuit affirming the reorganization court rulings was not published; it is reproduced herein as Appendix A. The rulings of the reorganization court affirmed by the court of appeals are also unpublished. The transcription of the oral ruling of the reorganization court given on January 25, 1980, is reproduced herein as Appendix C; the unpublished minute order, entered on January 28, 1980, is reproduced herein as Appendix B; and the minute order of that court, dated February 27, 1980, denying petitioner RLEA's motion to reconsider the ruling of January 25, 1980, is reproduced herein as Appendix D. Appendix E, hereto, is the unpublished judgment of the court of appeals affirming the rulings of the reorganization court.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 11, 1981, and no petition for rehearing, or suggestion for rehearing *en banc* has been filed. This petition for the issuance of a writ of certiorari has been filed within 90 days of the date of the Court of Appeals ruling. Petitioner RLEA seeks to invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the proper interpretation to be given to a Section 77 railroad reorganization court's powers under Section 77(a), (b), (c), (d) and (g) of the Bankruptcy Act, 11 U.S.C. §205(a), (b), (c), (d) and (g).[1] Those provisions are set forth herein as part of Appendix F to this petition. Bankruptcy Rules 8-301, 8-303 and 8-310 are also involved in this case, and are set forth in Appendix F as well.

STATEMENT OF THE CASE

This petition brings before this Court the decision of the reorganization court to liquidate the Rock Island, and it involves a controversy which is related to the matter which is presently before this Court in *RLEA* v. *Gibbons*, Sup. Ct. No. 80-1239, an appeal in which probable jurisdiction was noted on April 27, 1981. *RLEA* v. *Gibbons, supra*, is an appeal by RLEA from an *en banc* decision of the United States Court of Appeals for the Seventh Circuit affirming by an equally divided court a preliminary injunction issued by the CRI reorganization court enjoining enforcement of the employee protective provisions of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980, 45 U.S.C. §1001, *et seq.* One of the questions posed by RLEA in its Jurisdictional Statement in that case was whether the reorganization court was correct in concluding that the public interest no longer remained an integral part of its exercise of jurisdiction over the Rock Island under Section 77. No. 80-1239, Jurisdictional

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[1] Section 77 of the Bankruptcy Act has been repealed by the Bankruptcy Code of 1978, Pub. L. No. 95-598, 92 Stat. 2549, but that repeal is not effective for cases which were pending under that section before its repeal. Section 403(a), Pub. L. No. 95-598, 92 Stat. 2683.

Statement at p.i., No. 4. The decision to liquidate that carrier formed the basis for the reorganization court's conclusion that the public interest was subordinated to the interests of the creditors and shareholders, and it is that decision to liquidate which petitioner RLEA is now asking this Court to review.

Originally chartered in 1847, the Rock Island and its predecessor companies grew over the years so that by 1975 it was one of the largest railroads in this country operating in thirteen states mainly in the midwestern part of the country. By 1975, its system consisted of 8,139 miles of main line track, 2,329 miles of branch line, and 763.2 miles of trackage rights over other carriers. To operate that system, the CRI employed approximately 10,000 employees in 1978. Unfortunately, the CRI's financial posture did not equal its size.

Twice before the Rock Island's financial troubles had caused it to be reorganized through the courts,[2] and on March 17, 1975, the railroad's financial plight was so grave that the carrier once again sought the aid of the courts to restructure its financial base under Section 77 of the Bankruptcy Act. Thereafter, the CRI continued to operate for more than four and a half (4 1/2) years, and even though it operated under the protection of Section 77, the railroad continued to sustain both operating losses and an errosion of its traffic base. *Chicago, R.I. & P. R.—Abandonment,* 363 I.C.C. 150, 156-57 (1980). The Rock Island's rapidly deteriorating financial posi-

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[2] The Rock Island was one of the first carriers to use Section 77 of the Bankruptcy Act, and it was in that proceeding, *i.e.*, the reorganization of the Chicago, Rock Island and Pacific Railway Company, that this Court upheld the constitutionality of that statute. *Continental Illinois Nat'l Bank* v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648 (1935).

tion was exacerbated by the severe winter of 1978, which not only dramatically increased its losses, but also damaged its physical plant. *Id.* Consequently, by the summer of 1979, the future of the Rock Island was not bright; moreover, its creditors and shareholders were demanding an end to deficit operations and the liquidation of that carrier.

After several unsuccessful attempts to resolve certain contract negotiating disputes, one of the largest labor organizations representing Rock Island employees struck that railroad on August 28, 1979, and one day later, a second labor organization also struck that carrier. Once the railroad was struck by the two labor organizations, the Trustee "locked-out" the striking employees and abolished the positions of its other organized employees; the Trustee then attempted to operate a truncated system with non-union personnel. On September 20, 1979, however, the President of the United States created an Emergency Board to investigate those disputes pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. §160. *Executive Order No. 12,159,* 44 Fed. Reg. 54687 (Sept. 21, 1979).

Several days after the Emergency Board was created, the ICC concluded that the Trustee could not commence operations because the CRI was cashless, and using its emergency powers under 49 U.S.C. §11125, the ICC directed the Kansas City Terminal Railway Company [hereinafter, "KCT"] to operate "virtually all" of the Rock Island's lines. *Directed Service Order No. 1398,* 360 I.C.C. 289, 290-92 (1979). On September 27, 1979, the CRI reorganization court denied the Trustee's oral application for authority to continue operating the system, and on October 5, 1979, directed service operations began over most of the CRI by the KCT. Those

operations basically ended in late March 1980, and since that time portions of the Rock Island are being operated by other carriers under provisions of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. §1001, *et seq.*, and some of the other portions of the system have been sold. To this date, the Rock Island has not resumed operations, and in light of events since early 1980, the chances of that carrier ever resuming operations as they previously existed are virtually non-existent.

Section 77(d) of the Bankruptcy Act provides that the "debtor, after a petition is filed . . . , shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed . . . ." 11 U.S.C. §205(d). On September 8, 1975, the CRI reorganization court extended the time in which the debtor[3] could file the plan of reorganization, and thereafter, that time period was extended seven (7) more times until October 10, 1979, when the court gave the Trustee to December 1979 to file a plan. The Trustee filed a plan of reorganization on December 28, 1979, and sent a copy of that plan to the ICC.[4]

At a status conference on January 2, 1980, the reorganization court noted that Bankruptcy Rule 8-303 required that it transmit the Trustee's plan to the ICC not less than thirty (30) days after it was filed with the

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[3] On April 26, 1976, special procedural rules for the handling of Section 77 cases were adopted, effective August 1, 1976. Bankruptcy Rule 8-301(a)(1) modified Section 77(d) of the Act by placing the responsibility for formulating a plan upon the Trustee.

[4] The Trustee'a plan called for a "core" type of operation by which the reorganized system would operate much less than one-half of the CRI system, basically in the northeastern portion of its system.

court. However, the court believed that the rule gave the court some discretion to review the plan and to refuse to transmit it to the ICC if it concluded that the plan was completely without merit. *See,* Appendix A at 10a. On January 9, 1980, the reorganization court issued Order No. 221 in which it stated that it would "formally transmit" the plan of reorganization, and any modifications, comments or alternative plans to the ICC for its consideration; parties to the proceeding were directed to file by January 28, 1980, whatever comments they wished to make on the plan. Order No. 221 concluded by noting: "To aid in its scheduling, the Commission may rely upon receiving this Court's official submission of the Plan on or before February 5, 1980."

Before the date for filing comments had passed, the reorganization court conducted a status hearing on January 23, 1980, and then again on January 25, 1980, at which the major creditors, shareholders and the Federal Railroad Administration argued that in light of the January 21, 1980 report of Peat, Marwick, Mitchell & Company, the court should refuse to send the Trustee's plan to the ICC. Peat, Marwick, Mitchell & Company had been appointed as an independent consultant to the CRI reorganization court on July 26, 1979, and after the Trustee had filed his plan on December 28, 1979, that consultant was asked to review the feasibility of the plan. When the consultant filed its report with the Court on January 21, 1980, it concluded that the Trustee's proposal was not viable. Responding to that report, the opponents of the plan argued that the court would simply be wasting everyone's time by transmitting that plan, or indeed any plan of reorganization, to the ICC. Petitioner RLEA, and most of the other parties to the reorganization proceeding, had not been notified that

the court would be considering motions to reject the plan and liquidate the debtor.

After listening to the arguments of counsel who were present at that status conference,[5] the court concluded that the consultant's report "is a good study and I am compelled to accept its conclusions." Appendix C at 21a.[6] And as the court continued:

> This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.
>
> The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation . . . .

Appendix C at 21a-22a.

In its minute order entered January 28, 1980, the court stated that creditors were given leave to forward comments and suggestions as to such a plan of liquidation, and on February 19, 1980, appellant RLEA filed such comments, which the court on that same date ruled would be considered as a motion for reconsideration. RLEA argued that the court did not have authority to

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[5] The ICC was not represented at that hearing, and counsel for the Federal Railroad Administration informed the Court that the ICC, according to his information, would not appeal a refusal to transmit the plan. Appendix A at 5a n. 5.

[6] Counsel for the Trustee attempted to file a rebuttal to the study which had been filed only two days before, but it was objected to and not received. *See*, Appendix C at 22a-23a.

refuse to transmit the plan to the ICC and that the court lacked the jurisdiction to determine the merits of such a plan. Moreover, RLEA asserted that the court, as a reorganization court under Section 77, did not have the power to order the total liquidation of the debtor. On February 27, 1980, the court issued a minute order which read: "Motion of Railway Labor Executives' Association to reconsider the order of January 28, 1980, is denied." Appendix D. That was the court's sole ruling on the motion. Thereafter, RLEA filed a notice of appeal on March 13, 1980, to the United States Court of Appeals for the Seventh Circuit.

On February 11, 1981, the Seventh Circuit rejected RLEA's appeal and affirmed the decisions of the CRI reorganization court refusing to transmit the Plan of Reorganization to the ICC, and directing the Trustee to liquidate the estate. The appellate court, however, directed that the order not be published, and noted on its order that Rule 35 of the Local Rules of that Court provided that its ruling could not be cited as precedent. *See*, 7th Cir. Rule 35(b)(2)(iv).

Petitioner RLEA had argued to the appellate court that the role of a railroad reorganization court under Bankruptcy Rule 8-303 was purely ministerial and that the court did not have the discretion to decline to transmit a filed plan to the Commission. Moreover, relying upon this Court's conclusion in *Ecker* v. *Western Pacific R.*, 318 U.S. 448, 468 (1943), that Section 77 placed "reorganization under the leadership of the Commission, subject to a degree of participation by the court[,]" RLEA had argued that the reorganization court did not have the jurisdiction to conclude independently of the ICC that an insolvent railroad was not reorganizable. Those arguments were rejected by the

Seventh Circuit which relied upon this Court's decision in *New Haven Inclusion Cases*, 399 U.S. 392 (1970), to conclude "that the balance of power between the reorganization court and the ICC in Section 77(d) proceedings does not require the reorganization court to seek ICC consideration of a proposed reorganization plan when the court has found that the plan has no chance of success." Appendix A at 9a-10a. Building upon that conclusion, the appellate court found that a Section 77 reorganization court had the discretion under Bankruptcy Rule 8-303 to refuse to transmit a plan which the court concluded was without merit. Appendix A at 10a-11a. As the Seventh Circuit stated:

> The court's action did not circumvent ICC involvement in either the reorganization or liquidation process. The court did not simply withhold the Plan from the ICC and commence reorganization without ICC input. Rather, the court ordered the Trustee to prepare a new plan aimed at liquidation.

Appendix A at 11a.

Petitioner RLEA had also asserted before the court of appeals that a Section 77 reorganization court does not have the jurisdiction to order and to control the liquidation of a railroad. Noting that Section 77(b)(5) of the Bankruptcy Act provides that a plan of reorganization may include provisions for the "sale of all or any part of the property of the debtor[,]" and relying upon this Court's ruling in the *New Haven Inclusion Cases* upholding the sale of that debtor's assets to another railroad as a viable plan of reorganization, the court of appeals concluded that "each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor, and liquidation may be an appropriate option." Appendix A at 14a. Liquidation, the court then held, was an appropriate result in the Rock Island case. Appendix A at 15a.

Much has occurred to the Rock Island estate during the period that RLEA's appeal was pending before the Seventh Circuit. Pursuant to the reorganization court's directive, the Trustee has been proceeding to liquidate the estate by selling portions of the lines, rejecting leases, selling locomotives and repair facilities, and, finally, obtaining approval under Section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §915(a), to abandon the entire CRI system.[7] In June 1980, petitioner RLEA sought a stay of any further liquidation steps, but on November 21, 1980, the Seventh Circuit ordered that RLEA's stay motion would be taken with the case. In December 1980, RLEA renewed its motion for a stay, but on December 24, 1980, the appellate court denied that request stating that petitioner's motion of June 1980 "seeking a general stay pending appeal in this case, shall be resolved at a later date by the merits panel." Appendix A at 8a.

REASONS FOR GRANTING THE WRIT

1. This Petition Raises Important Issues As To The Orderly Administration Of A Section 77 Reorganization Which Must Be Resolved By This Court To Aid The Midwestern Region Of This Country Pass Through Its Current Crisis In Rail Transportation

Rail freight transportation is clearly an integral and vital part of our nation's total transportation system, but

[7] That abandonment was authorized on June 2, 1980, and on June 9, 1980, RLEA noted an appeal of that order to the Seventh Circuit (No. 80-1788). RLEA and the appellees have filed their initial brief in that appeal; RLEA's reply brief is due on May 15, 1981, and it is anticipated that the case will be argued during the summer of 1981. On August 4, 1981, the United States also noted an appeal to the Seventh Circuit from the abandonment order (No. 80-2075); that appeal, however, is being held in abeyance pending a ruling by this Court in *RLEA* v. *Gibbons*, Sup. Ct. No. 80-1239.

at the present time that service is severely threatened in the midwestern region of our country. Rail transportation to thirteen (13) states has been severely interrupted by the demise of the Rock Island, and the present financial plight of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company [hereinafter, "Milwaukee"] threatens even further reductions in rail service to the northern portion of that region. Since both the Rock Island and the Milwaukee are railroads in reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205,* the powers, duties and limitations of the Rock Island reorganization court apply equally as well to those of the Milwaukee reorganization court. If the Rock Island reorganization court has the authority to conclude on its own that the debtor cannot be reorganized and that it should be liquidated without preserving essential rail services, so too could the Milwaukee Section 77 court reach a similar conclusion. Petitioner RLEA respectfully submits that the two reorganizations are intertwined, and unless the court of appeals' ruling in this case is reviewed, that decision may well lead to the sudden cessation of Milwaukee service in the near future.

Although RLEA is well aware that the passage of time and the unstayed liquidation process most likely means that the Rock Island will never resume its own operations, a resolution of the issues posed by this petition is still vital to the orderly administration of the Rock Island, and, petitioner submits, to the Milwaukee reorganization's administration as well. If petitioner is correct in its interpretation of the interplay of the roles

* The Milwaukee, since December 19, 1977, has been in reorganization under Section 77 before the United States District Court for the Northern District of Illinois (No. 77 B 8999), the same court before which the CRI is being reorganized.

of the ICC and the reorganization court in a Section 77 proceeding, and if petitioner is correct in asserting that the liquidation of a railroad is not permitted under Section 77, then the ICC will once again be required to assume jurisdiction over the Rock Island estate to devise, if possible, with the aid of the Trustee and interested parties an overall plan which preserves as much rail service to the midwest while at the same time conserving the debtor's estate for the benefit of creditors and shareholders. This will mean that an administrative agency with an expertise in rail transportation will supervise the orderly sale of the Rock Island in such a manner that together with the reorganization court, the dual objectives of a Section 77 case can still be maintained. *See, New Haven Inclusion Cases,* 399 U.S. 392, 431 (1970). Such a result, petitioner submits, was intended by Congress to be the rule under Section 77. As this Court explained in *Ecker* v. *Western Pacific R.,* 318 U.S. 443 (1943):

> These reorganizations [under §77] require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest. Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, §77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.

318 U.S. 468. (footnote omitted)

At the present time, the CRI reorganization court has ruled that as a result of its liquidation order and the cessation of CRI operations, the "continuing activities toward the end of liquidating and distributing its [CRI] assets to creditors are no longer of significant concern to the Interstate Commerce Commission." *In re Chicago, R.I. & P.R.*, N.D. Ill. No. 75 B 2697, order entered December 19, 1980, slip op. at 3-4. As the court further explained its present posture:

> Upon the order of liquidation, this case became a pure bankruptcy case. The mandate of Congress for the protection of the public interest in a viable national transportation system continues to be the concern of the Interstate Commerce Commission but has become a matter extraneous to the bankruptcy proceeding.

Id. at 4. Unless this liquidation order is set aside, that subordination of the public interest will continue, and, as the Trustee has urged in recent proceedings before the CRI reorganization court, track may be scraped rather than sold to willing purchasers for continued rail usage if its scrap value will give a higher return to the estate than a sale as operating property. Transcript of February 10, 1981 at 19, 88-89, *but see*, Tr. at 74-75.

2. The Decision Of The Court Of Appeals Conflicts With Decisions Of This Court Detailing The Relationship Between The ICC And A Section 77 Reorganization Court

Petitioner RLEA argued to both the CRI reorganization court and the court of appeals that a Section 77 reorganization court did not have the authority to conclude, without first obtaining a ruling from the ICC, that a railroad was not reorganizable since Congress has given the Commission the primary responsibility

for formulating a plan of reorganization under Section 77. Moreover, petitioner RLEA argued that Bankruptcy Rule 8-303, by its use of the word "shall," did not give the CRI reorganization court the discretion to refuse to transmit to the ICC a properly filed plan of reorganization. The Seventh Circuit disagreed with RLEA because it read this Court's decision in the *New Haven Inclusion Cases, supra,* 399 U.S. at 431-34, as emphasizing "the important, indeed dominant role of the reorganization court in Section 77 proceedings." Appendix A at 9a. And because of its view that the paramount role played in the reorganization of a debtor, the appellate court concluded that the court could examine and conclude independently of the ICC that a proposed plan of reorganization was so without merit that it should not even be sent to the ICC for the ICC to begin its role under Section 77(d) to formuate the shape of the carrier's reorganization. Appendix A at 9a-11a. Petitioner RLEA respectfully submits that such an expanded view of the powers of a Section 77 reorganization court conflicts with prior decisions of this Court defining the roles of the courts and the ICC under Section 77. *Ecker* v. *Western Pacific R., supra; Palmer* v. *Massachusetts,* 308 U.S. 79 (1939).

Section 77 is a unique bankruptcy statute for it injects the public interest factor into proceedings involving an insolvent entity. Because of that unique feature, any reorganization under Section 77 has twin objectives — *i.e.,* to conserve the debtor's assets for the benefit of all creditors, and to preserve the ongoing railroad in the interest of the public. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 431. Moreover, the addition of the public interest to traditional bankruptcy proceedings lead Congress to declare that the ICC was to play a major role in any restructuring of a debtor under Section 77.

As this Court explained in *Palmer* v. *Massachusetts, supra,* a case in which the Court was delineating the role of the reorganization court vis-a-vis that of a state administrative agency:

> [A]n insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of §77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.
>
> The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commission's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission.

308 U.S. at 86-87 (footnotes omitted). This Court further explained the relationship between the two roles and observed that in *Ecker* v. *Western Pacific R., supra,* since the public interest "bulks large" in the problem of reorganizing a railroad, the solution of that problem is "largely a function of the legislative and administrative agencies of government . . . ." 318 U.S. at 468. Consequently, *Ecker* continued, "§77 manifests the intention of Congress *to place reorganization under the leadership of the Commission,* subject to a degree of participation by the court." *Id.* (emphasis added). As the Court noted, the ICC has the "primary responsibility" to formulate a suitable plan. *Id.*

Relying upon those cases, the First Circuit Court of Appeals has stated that: "Section 77 does not contemplate that a court will make, as a matter of course, an unaided judgment on reorganizability before the ICC has considered the matter . . . ." *In re Boston & Maine Corp.*, 484 F.2d 369, 372 (1st Cir. 1973). But yet, that is exactly what the Seventh Circuit has allowed the CRI reorganization court to do in this case under the guise of determining whether the plan as proposed by the Trustee was with or without merit. The case at bar does not present a situation where the reorganization court has found that the plan was deficient on its face (*i.e.*, manifestly frivolous; *see, In re Boston & Maine Corp., supra* at 372), for the court based its conclusion as to the non-reorganizability of the Rock Island upon the report of its independent expert. The court *balanced* the merits of the study and the plan and then, petitioner submits, substituted its judgment (albeit based on its experience with the debtor) for the judgment of the ICC under Section 77(d).

Petitioner RLEA respectfully submits that if *Ecker* and *Palmer* are still good law today, the court of appeals decision improperly expands the powers of a Sction 77 reorganization court beyond that given to them by Congress. Moreover, the appellate court has permitted the CRI reorganization court to devise and implement a plan which liquidates the railroad without the ICC having first formulated that plan.

3. The Decision Of The Seventh Circuit Conflicts With The Long Established View Of The Limitations On The Jurisdiction Of A Section 77 Reorganization Court And With A Decision Of Another Court Of Appeals

Noting that Section 77 specifically provides in Section 77(b) that a plan of reorganization can involve the sale of all of the railroad's property, the court of ap-

peals concluded in this case that Section 77 gives the reorganization court the power to liquidate the debtor—*i.e.*, to turn a Section 77 reorganization into a straight bankruptcy. To reach that result, the appellate court relied upon the result approved by this Court in the *New Haven Inclusion Cases, supra,* but in doing so it ignored the long established view as to the limitations of Section 77's grant of jurisdiction to a reorganization court. Moreover, by upholding a liquidation order which was entered without first providing for the preservation of rail service, the appellate court's decision in this case is in conflict with the decision of the Third Circuit in *In re Lehigh Valley R.*, 558 F.2d 137 (3rd Cir. 1977).

Section 77 was first added to the Bankruptcy Act in 1933 (47 Stat. 1467, 1474), and it was amended in 1935 (49 Stat. 911); a review of both the 1933 and 1935 statutes clearly shows that Congress did not intend to give railroad reorganization courts the power to liquidate the estate of the debtor. Prior to 1933, railroads were "excluded from operation of the bankruptcy laws" (H. Rpt. No. 1897, 72nd Cong., 2d Sess. at 5 (1933)), and when Congress brought those carriers under the protection of the bankruptcy laws, it did so in a limited way. Section 77 was intended in 1933 to provide "the opportunities for amicable adjustment between debtor and creditor, for rehabilitation and reorganization. " *Id.* at 8. Congress achieved that purpose in Section 77 by utilizing the reorganization and rehabilitation features of its bankruptcy powers, rather than by providing for the use of the traditional liquidation aspects of bankruptcy. *See,* 18 Attorney General's Committee on Bankruptcy Administration, Preface at 5. That Congress did not intend to extend the liquidation powers of bankruptcy courts to railroad reorganizations is apparent from the fact that it expressly provided for the liquidation of

debtor estates in a companion section of the Act in which Section 77 was first enacted, but omitted such express powers in Section 77. *See,* Section 74(1), 47 Stat. 1469 (Individual debtors). In fact, railroads were expressly excluded from the bankruptcy sections of the Act, and that exclusion continued to the time of the repeal of Section 77 in 1978. Section 4 of the Bankruptcy Act, 11 U.S.C. §22.

In the years since the enactment of Section 77, it has been recognized by commentators,[9] by the courts,[10] by Congress,[11] and by the ICC[12] that Section 77 does not give a railroad reorganization court the power to liquidate an estate. When Congress, in carrying out some other statutory scheme, wanted to give certain railroad reorganization courts that authority, it did so by specific enactments. *E.g.,* Section 618(b), Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 45 U.S.C. §791(b); 11 U.S.C. §1174. Congress has not given the Rock Island Reorganization Court that authority, and indeed specifically withheld it when it enacted the Bankruptcy Reform Act of 1978 and refused to make the provisions of that Act dealing with liquidations applicable to pending Section 77 cases. Pub. L. No. 95-598, Section 403, 92 Stat. 2683 (1978).

In this case the Court of Appeals attempts to support its view that Section 77 has amended itself to give now the power to liquidate, by relying upon the decision

[9] *E.g.,* J. I. Weinstein, *The Bankruptcy Law of 1938,* at 175 (Nat'l Assoc. of Credit Men, 1938): "[R]ailroads have been brought under the jurisdiction of the Bankruptcy court. However, a railroad corporation is still not subject to an adjudication or liquidation in bankruptcy."

[10] *Van Schaick* v. *McCarthy,* 116 F.2d 987 (10th Cir. 1941).

[11] S. Rpt. No. 95-989 at 12 (1978).

[12] *E.g., In re Penn Central Transp. Co.,* 347 I.C.C. 45, 84-85 (1973).

of this Court in which a liquidation of the estate was the end result of a Section 77 reorganization. Appendix A at 13a-14a. However, the error or relying upon the *New Haven Inclusion Cases, supra*, is that in that case the reorganization court had first taken steps to assure that the bulk of the rail properties will continue to be operated as a railroad by someone. In the *Lehigh Valley* case, the Third Circuit reviewed the powers of Section 77 courts to order and to control the liquidation of a debtor railroad, and it concluded in one portion of its decision after an exhaustive analysis of this area that if a railroad is not reorganizable on an income basis:

> §77 can be used to reorganize the enterprise to produce a permanent withdrawal of the debtor from common carrier operations. The only limitation which the [Supreme] Court seems to impose is that the reorganization "plan contemplates that the bulk of the rail properties will continue to be operated as a railroad by someone."

558 F.2d at 145. While the court of appeals in the CRI case relied upon both the *New Haven* and the *Lehigh* cases to support its affirmance of the CRI reorganization court's liquidation orders, those decisions actually conflict with the Seventh Circuit's ruling because in this case the CRI reorganization court did not take any steps to assure the continuation of rail services *before* it ordered the Trustee to begin to liquidate the estate.

Petitioner RLEA respectfully submits that even though Section 77 has been repealed, it is still important to both this case and to the Milwaukee reorganization proceedings that this Court review this issue, and determine if a Section 77 reorganization court can order a railroad liquidated where neither it nor the ICC has first provided for the continuation of essential rail services.

CONCLUSION

For the reasons set forth above, petitioner RLEA respectfully requests that this Court issue a writ of certiorari to review and to reverse the decision of the United States Court of Appeals for the Seventh Circuit affirming the orders of the CRI reorganization court refusing to transmit the plan of reorganization to the ICC, and authorizing the liquidation of the debtor without first providing for the preservation of rail services.

Respectfully submitted,

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Date: May 12, 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

ARGUED: December 8, 1980
February 11, 1981

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

No. 80-1353

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*

APPEAL OF: RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Intervenor.*

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 75 B 2697
Frank J. McGarr, *Judge.*

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

ORDER

This case presents one aspect of the continuing saga of the decline of the Chicago, Rock Island and Pacific Railroad Company ("Rock Island"). There are two questions before us in this appeal:

(1) Did the district court, sitting as railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, have the discretion to determine that the Trustee's plan of reorganization was unworkable and to refuse to transmit that plan to the Interstate Commerce Commission ("ICC")?

(2) Did the district court, sitting as a railroad reorganization court, have the authority to order the Trustee to commence liquidation of the railroad?

The Railway Labor Executives' Association ("RLEA") argues that we should reverse the district court's order directing the Trustee to liquidate the Rock Island estate and that we should order the district court to transmit to the ICC the plan of reorganization filed by the Trustee on December 28, 1979. The Trustee of the Rock Island, William M. Gibbons, and various creditors of the Rock Island ("Creditors")[1] ask us to dismiss this appeal as moot or to affirm the actions of the district court.

I

On March 17, 1975, the Rock Island filed a petition for reorganization in the United States District Court for the Northern District of Illinois under Section 77 of the Bankruptcy

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[1] The parties referred to collectively as "Creditors" are as follows: First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as indenture trustees, and Henry Crown, et al., holders of first mortgage bonds, income debentures and common stock of the Rock Island.

The Trustee joined in the Creditors' Brief solely on the ground that the liquidation is not reversible and is so far advanced that any delay would be physically and economically impossible.

Act, 11 U.S.C. §205.[2] Judge McGarr was assigned to act as the reorganization court. On March 28, 1975, William M. Gibbons was appointed Trustee of the Rock Island and was instructed to manage and operate the debtor's railroad system.

Section 77(d) provides that "[t]he debtor, after a petition is filed . . . , shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed . . . ." 11 U.S.C. §205(d). The reorganization court several times extended the deadline for the Trustee to file a plan of reorganization. The Trustee filed his Plan of Reorganization ("Plan") on December 28, 1979.[3]

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[2] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), enacted November 6, 1978, codified and changed the prior Bankruptcy Act, including former Section 77. Section 403(a) of the Bankruptcy Reform Act, 92 Stat. 2683, however, provides that pending reorganizations, such as the one at bar, were to be governed by the previous law except for a few exceptions set forth in Section 403(b).

[3] Throughout the five years of reorganization prior to the filing of the Plan, the Rock Island suffered significant financial losses. The ICC found the Rock Island to be cashless on September 26, 1979, and ordered the Kansas City Terminal Railway Company ("KCT") to provide directed service over the Rock Island routes. *Directed Service Order No. 1398, Kansas City Terminal Ry. — Directed to Operate Over — Chicago, R. I. & P.*, 360 I.C.C. 289 (1979). This directed service was in effect at the time of the order appealed in the case at bar.

KCT's directed service ended on March 23, 1980. Following KCT's directed service operations, other rail carriers provided rail service over the Rock Island's lines through May 31, 1980, pursuant to ICC directed service orders. On May 30, 1980, the President signed the Rock Island Railroad Transition and Employee Assistance Act (the "Rock Island Act"), P.L. 96-254, 94 Stat. 339 (1980). The Rock Island Act provides for the continuation of directed service pending sales of the Rock Island's freight lines to other interested rail carriers and its Chicago-Joliet commuter line to the Regional Transportation Authority.

An informational copy was furnished to the ICC in accordance with Bankruptcy Rule 8-301(c).

On January 8, 1980, the court entered Order No. 221. In that order the court found: it had jurisdiction pursuant to Bankruptcy Rule 8-303[4] to retain the Plan for not less than thirty days; during that time the court would review the plan in the context of a study by Peat, Marwick & Mitchell, a court appointed independent consultant, and would consider modifications, alternative plans, and comments; the informational copy of the plan filed with the ICC did not constitute an official filing with the ICC; and the court would "formally transmit the Plan of Reorganization, modifications to it, and alternative plans, in accordance with Bankruptcy Rule 8-303, with whatever comments it may have to the Commission for their action, pursuant to Bankruptcy Rule 8-303, with instructions to the Commission that the Commission should consider the Plan at that time."

On January 21, 1980, Peat, Marwick, Mitchell & Co. filed its report, in which it concluded that the core operation proposed by the Trustee in the Plan was not viable. At a status hearing on January 25, 1980, the Creditors and the Federal Railroad Administration argued that since the independent consultant had concluded that the Trustee's Plan was not feasible, the court should direct the Trustee to withdraw the Plan and to file a new plan which would provide for the total liquidation of the estate. The Creditors argued that the court would simply be wasting everyone's time in transmitting the Plan, or any reorganization plan, to the ICC. At that time, the Trustee argued that the Plan should be forwarded to the ICC for evaluation of the reorganizability of the core.

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[4] Bankruptcy Rule 8-303 provides:

> Not less than 30 days after the first filing of a plan under Rule 8-301, the court shall transmit all plans and modifications which have been filed with it to the Interstate Commerce Commission for filing with and consideration by the Commission.

After listening to the arguments of counsel who were present at that status conference,[1] the court concluded that the consultant's report "is a good study and I am compelled to accept its conclusions." Tr. 97. The court continued:

> This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.
>
> The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation . . . .

Tr. at 97. The court's minute order of January 25, 1980 granted the Creditors' motion that the court decline to forward the Plan to the ICC and directed the Trustee to begin preparation of a plan of liquidation.

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[1] The ICC did not appear at the hearing of January 25, 1980, although the ICC had been active in the proceedings to that date. At the January 25 hearing, John Broadley of the United States Department of Justice, representing the Federal Railroad Administration, stated:

> In connection with preparing a proposed order I had a discussion with Mr. Rush yesterday about the position the Commission would likely take if your Honor entered an order directing the Trustee to withdraw this plan. Mr. Rush indicated that if your Honor entered such an order the Commission, in all likelihood, would not find it expedient, necessary or proper to appeal that decision on jurisdictional grounds. And the Commission has frequently expressed concern about the exercise of its primary jurisdiction. Mr. Rush's indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision.

Tr. at 56-57. Mr. Broadley joined the creditors in seeking to have the plan of reorganization withdrawn.

On February 19, 1980, the RLEA filed comments on the court's January 25 order. The court ordered that it would treat the comments as a motion for reconsideration. On Febraury 27, 1980, the court denied the RLEA's motion to reconsider. The RLEA appeals from both the order of January 25, 1980 and the denial of reconsideration.

Before proceeding to the legal arguments, we briefly recount the history of the Rock Island since February, 1980. On March 19, 1980, the court entered Order No. 229, which required the Trustee to file a plan of reorganization by July 17, 1980, encompassing the liquidation of the assets of the debtor. On April 14, 1980, the court entered Order No. 232, which directed the Trustee to file an application with the ICC "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operation thereof."[6]

The ICC filed its report in response to the Trustee's application for system-wide abandonment on May 23, 1980. Docket No. AB-46 (Sub.-No. 22). The ICC concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Docket No. AB-46 (Sub.-No. 22) at 3. The ICC denied the RLEA's motion to reject the abandonment application. *Id.* at 5-6.

On June 2, 1980, the reorganization court held hearings concerning the proposed abandonment and ordered total system-wide abandonment of the Rock Island's lines and discontinuance of its service.

The Trustee already has taken various steps toward liquidating the Rock Island. On June 16, 1980, the RLEA

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[6] Section 17(a) of the Milwaukee Road [*sic*] Restructuring Act ("MRRA"), Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred ultimate jurisdiction over abandonments from the ICC to the reorganization court for cases pending under Section 77 of the Bankruptcy Act. Section 17(a) of the MRRA provides that the court may authorize abandonments pursuant to 11 U.S.C. §1170.

moved for a stay of liquidation, detailing the progress of the liquidation as follows:

> Rolling stock leases have been assigned or terminated while other operating equipment has been sold. On May 5, 1980, the District Court entered Order No. 234 granting the Trustee blanket authority to liquidate real and personal assets and accounts under $100,000.00 in value. Real property, such as track rights of ways, has been sold. *See*, Docket Sheet Page 194-95. Also, an independent consultant has been retained by the estate to expeditiously liquidate the real property of the estate. Order dated May 28, 1980.

RLEA Motion to Stay at 5. On November 21, 1980, this court ordered that the RLEA's motion to stay further acts of liquidation pending appeal would be taken with the case at the time of its dispostion.

On December 20, 1980 the RLEA filed with this court its "Emergency Renewal of Motion by Railway Labor Executives' Association to Stay All Further Acts of Liquidation Pending Appeal." The "Renewed Motion" was prompted by the Trustee's announcement of his intention to sell the Silvis, Illinois, facility and 214 locomotives to the Varlen Corporation. The RLEA argued that:

> [t]his single sale will surely decrease the already slim chances for reorganizing the Rock Island, for any resumption of rail operations over the core structure would encounter severe difficulties in resuming operations without sufficient engines and a major repair facility.

RLEA Renewed Motion at 4.

On December 24, 1980 we entered the following order:

> It Is Ordered that the renewed motion is Denied to the extent that it seeks a stay of the sale of the properties mentioned in the intervenor-appellant's renewed motion. Intervenor-appellant has failed to satisfy all of the requirements for a grant of stay pending appeal. We can-

not conclude at this point in our deliberations that the intervenor-appellant shall prevail on the merits of this appeal.

The intervenor-appellant's motion of June 16, 1980, seeking a general stay pending appeal in this case, shall be resolved at a later date by the merits panel.

We now reach the merits and conclude that the district court acted within its authority in refusing to transmit the Trustee's plan of reorganization to the ICC and in ordering the Trustee to commence liquidation of the Rock Island.

II

Section 77(d) of the Bankruptcy Act, 11 U.S.C. §205(d), deals with the filing of a plan of reorganization in a railroad reorganization. The RLEA argues that the ICC is to play the major role in reorganizing a debtor under Section 77, and that Bankruptcy Rule 8-303 cannot enlarge the jurisdiction of the court to examine the merits of a plan prior to transmittal to the ICC pursuant to Rule 8-303.

First, the RLEA argues that the ICC has the primary responsibility for formulating a reorganization plan and that, therefore, the reorganization court should not have rejected the Plan before the ICC had a chance to consider it. The RLEA finds support for its argument in *Ecker* v. *Western Pac. RR. Corp.*, 318 U.S 448 (1943), where the Supreme Court stated:

> When examined to learn the purpose of its enactment, §77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.

318 U.S. at 468. But, while recognizing the importance of the expertise of the ICC, the Supreme Court also recognized the power of the reorganization court to find that a debtor is unreorganizable. The Supreme Court acknowledged that the reorganization court can veto a reorganization plan in its entirety after certification of the plan by the ICC. 318 U.S at 474. *See* Section 77(e), 11 U.S.C. §205(e).

The RLEA's reliance on *Ecker* to establish that the reorganization court should defer to ICC findings is misplaced. In *Ecker*, the Court affirmed the district court's approval, pursuant to Section 77(e), of a plan of reorganization certified by the ICC. The Court reversed the Ninth Circuit's finding that the district court should have exercised its independent judgment with respect to subjects such as valuation. A reorganization court's acceptance of ICC findings in proceedings pursuant to Section 77(e) simply is not relevant to the question of whether the reorganization court can order the Trustee to withdraw a propsed plan *before* submission to the ICC. *Ecker* dealt with the reorganization court's scope of review of a plan *after* certification by the ICC, not with a proposed plan submitted to the court by the Trustee.

Furthermore, in the more recent *New Haven Inclusion Cases*, 399 U.S. 392, 431-34 (1970), the Supreme Court emphasized the important, indeed dominant, role of the reorganization court in Section 77 proceedings. In that case, as in *Ecker*, the issue was the reorganization court's scope of review of ICC findings pursuant to Section 77(e). The Court stated:

> The statutory authority to appoint special masters and hold evidentiary hearings reflects the unique powers possessed by the reorganization court in passing upon the Commission's proposed plan of reorganization.
>
> . . .
>
> In the reorganization court reposes ultimate responsibility for determining that the plan presented to it by the Commission satisfies the "fair and equitable" requirement of §77.

399 U.S. at 434. Without deciding to what degree *New Haven Inclusion Cases* erodes *Ecker*'s deference to ICC expertise in Section 77(e) proceedings,[7] we find that the balance of power

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[7] In his dissent, Justice Black complained of the majority's departure from *Ecker*. 399 U.S. at 499.

between the reorganization court and the ICC in Section 77(d) proceedings does not require the reorganization court to seek ICC consideration of a proposed reorganization plan when the court has found that the plan has no chance of success.

Next, the RLEA argues that the structure of Section 77(d) and Rule 8-303 show that the court's role with respect to the Trustee's plan is purely ministerial. The RLEA claims that the purpose of allowing the court to retain a plan for *not less than* 30 days is only for the sake of achieving efficiency by assuring that "all proponents of plans have filed their plans prior to transmission of the first filed plan to the Commission." Rule 8-303, Advisory Committee Note. We disagree. The ordinary outcome under Rule 8-303 will be that the court will transmit a plan to the ICC. But we cannot say that the court has no discretion whatsoever to aid in the efficient management contemplated by Rule 8-303 by refusing to transmit a manifestly unfeasible plan to the ICC.

Shortly after the Trustee's Plan was submitted, but before it was evaluated in light of the Peat, Marwick study, the reorganization court reflected on the purposes of Rule 8-303:

> Those purposes are obviously a preliminary review by the Court, of the proposal of alternative plans, and in the particular instances of this case an opportunity for the Court and the creditors and the Railroad, and the Government, to view this plan in the context of the Peat, Marwick evaluation of it. And under any ordinary circumstance that would not only be the ordinary course of the case but the wise course of the case. I think the thirty days is therefore a purpose. I recognize that the Court had very little discretion in this matter in terms of what it might do with the plan. It is conceivable to me, although I doubt that it will be applicable in this case, that the plan presented be one either by reading on its face or in the light of the Peat, Marwick evaluation, be one so completely without merit that the Court will not forward it to the Commission and order the preparation of another one, something more sensible.

Tr. of January 2, 1980 at 31-32. The court recognized that its discretion not to submit the plan to the ICC was limited to a situation that the court doubted would occur — that the plan was without merit in light of the Peat, Marwick, study. But that situation did occur, and the court properly exercised its discretion not to transmit the plan.

The court's action did not circumvent ICC involvement in either the reorganization or liquidation process. The court did not simply withhold the Plan from the ICC and commence reorganization without ICC input. Rather, the court ordered the Trustee to prepare a new plan aimed at liquidation. In fact, the court stated that the January 25, 1980 decision not to transmit the plan to the ICC "starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service . . . ." Tr. of January 25, 1980 at 98.

The ICC has not challenged the reorganization court's actions. At the hearing before the January 25 ruling, the government representative present informed the court that "[ICC counsel's] indication to me was that if your Honor finds that the plan has no merit and decides that you should order the Trustee to withdraw it, that the Commission would acquiesce in that decision." Tr. of January 25, 1980 at 56-57. In addition, the ICC's May 23, 1980 report recommending abandonment supports the court's view. The ICC states that

> [w]e have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated.

Docket No. AB-46 (Sub.-No. 22) at 3-4.

In light of the ICC's deference to the reorganization court's view of the Trustee's plan, as well as that court's great

familiarity with the Rock Island through five years of reorganization proceedings, it is inaccurate for the RLEA to argue that the court simply "substituted its judgment for that of the Commission." Reply Br. at 7. The court's decision must be viewed in the context of the entire history of the Rock Island. Judge McGarr stated in his January 25, 1980, ruling:

> I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundance of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

Tr. of January 25, 1980 at 95. Therefore, we hold that Judge McGarr's decision not to transmit the Trustee's plan to the ICC violated neither Section 77(d) of the Bankruptcy Act nor Bankruptcy Rule 8-303.

III

The RLEA argues that, in addition to not having jurisdiction to decide that the Trustee's plan was without merit, the reorganization court did not have the jurisdiction to order the Trustee to liquidate the Rock Island. The RLEA claims that Section 1174 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §1174, for the first time permitted railroad reorganization courts to direct and control liquidations, and that Section 77 of the Bankruptcy Act, which applies to this case,[1] contains no authority for liquidation. Thus, the RLEA

[1] According to §403 of the Bankruptcy Reform Act, some provisions of the new Bankruptcy Code are applicable to Section 77 cases pending before its enactment. But, Section 1174 is not one of those sections which applies to cases commenced under the Bankruptcy Act. Pub. L. No. 95-598, 92 Stat. 2683 (1978).

argues that the court may dismiss the petition for undue delay in reorganization, pursuant to Section 77(g) and Bankruptcy Rule 8-310, but it may not unilaterally determine that the debtor is unreorganizable and order liquidation.

According to the RLEA's interpretation Section 77, the reorganization court must either dismiss the petition for reorganization or continue reorganization. The RLEA does not acknowledge the possibility that liquidation may be the end result of a Section 77 reorganization. But the RLEA's view ignores the fact that it is difficult to mark the point at which an attempt to reorganize becomes a liquidation. It would be absurd to hold that the reorganization court may supervise liquidation of all but a small core railroad, yet cannot supervise the liquidation of much of the same property once the concept of a viable core has been rejected.

Section 77 does to set any limit on what portion, if any, of the debtor must be preserved pursuant to Section 77 proceedings. Section 77(b), 11 U.S.C. §205(b) states:

> (b) A plan of reorganization within the meaning of this section . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the *sale of all* or any part of the property of the debtor . . . .

(emphasis added). In *New Haven Inclusion Cases*, the Supreme Court discussed the reorganization court's power to sell the assets of the New York, New Haven & Hartford Railroad ("New Haven") pursuant to §77(b) (5). After noting that the reorganization court and trustees were "charged with the dual responsibility of conserving the debtor's estate for the benefit of creditors and preserving an ongoing railroad in the public interest," 399 U.S. at 420, the Court stated:

> The provisions of §77 "doubtless suffice[d] to confer upon the [reorganization court] power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings." *Id.*, at 85-86; cf. 5 Collier, *supra*, ¶ 77.11, at 498-499. Together, the court and the Com-

> mission "unquestionably" had "full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that [might] be asserted against it." *Callaway v. Benton*, 336 U.S. 132, 147. One such power was precisely that which the Commission was about to propose that the reorganization court exercise — the power to confirm a plan of reorganization providing for "the sale of all . . . of the property of the debtor . . . ." Bankruptcy Act, §77(b) (5), 11 U.S.C. §205(b) (5).

399. U.S. at 421 (footnote omitted). *See also Matter of Lehigh Valley R.R. Co.*, 558 F.2d 137, 141-47 (3rd Cir. 1977) and cases cited therein.[9] These cases indicate that each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor, and liquidation may be an appropriate option.

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[9] In *Lehigh Valley*, the Third Circuit stated that "these cases provide persuasive support for the proposition that the reorganization of a railroad may properly continue under Section 77 despite the fact that the enterprise is no longer capable of being reorganized into a working railroad." 558 F.2d at 146. The court concluded that the reorganization court had jurisdiction "to reorganize or liquidate the enterprise pursuant to §77, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of the debtor's estate." 558 F.2d at 146-47.

The RLEA argues that the Lehigh Valley reorganization court's authority to liquidate under Section 77 comes from §618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, which added §601(b)(4), 45 U.S.C. §791, to the Regional Rail Reorganization Act of 1973 ("Rail Act"), Pub. L. 93-236, 45 U.S.C. §§743, 744. But *Lehigh* and the cases discussed therein actually stand for the opposite result: the amendment authorized the continuation of Section 77 proceedings *despite* the special provisions in the Rail Act which transferred working railroad property to Conrail. 558 F.2d at 141-42.

The RLEA does not seriously urge dismissal of this action and resort to equity receiverships for liquidation,[10] but it does argue that an equity receivership is the only way that the creditors of the Rock Island may withdraw their assets from public use at this time. The RLEA claims that since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization prodeedings and has determined that continued operation of the Rock Island no longer serves the public interest. Thus, the liquidation order does not violate the public interest considerations required by Section 77.

In summary, the reorganization court had the jurisdiction under Section 77 to decline to accept the Trustee's Plan and to order the Trustee to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its discretion in exercising that jurisdiction. Because of our holding on the merits, it is unnecessary to reach the Creditors' argument that this case is moot.

The order appealed from is

AFFIRMED.

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[10] One of the reasons for enactment of Section 77 was to avoid equity receiverships for railroads. As stated in *New Haven Inclusion Cases*:

> Congress enacted [Section 77] in part "to prevent the notorious evils and abuses of consent receiverships," *New England Coal & Coke Co.* v. *Rutland R. Co.*, 143 F.2d at 184, of which one of the more egregious was the requirement of an ancillary filing and order of appointment in the federal court for every district in which the debtor had property.

399 U.S. at 426-27.

APPENDIX B

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable FRANK J. MCGARR

Cause No. 75 B 2697 Date January 25, 1980

Title of Cause In the Matter of Chicago, Rock Island and Pacific Railroad Company, Debtor.

Brief Statement of Motion Status hearing

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Docketed Jan. 28 1980

Reserve space below for notations by minute clerk

Status hearing held. Arguments are heard, Motion of creditors that the Court decline to forward proposed Plan of Reorganization to Interstate Commerce Commission is granted. The proposed plan, filed with the Court, is deemed without merit and the Court declines to forward such plan to the Commission as provided in Bankruptcy Rule 8-303. Trustee directed to commence preparation of preliminary plan for liquidation, and creditors given leave forward comments and suggestions as to such plan to Trustee with copies to the Court. Status hearing continued on Feb. 19 1980 at 2:00 p.m.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

APPENDIX C

IN THE UNITED STATES DISTRICT DOURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

IN THE MATTER OF:
CHICAGO, ROCK ISLAND &
PACIFIC RAILROAD COMPANY, *Debtor*

Partial Transcript Of Proceedings

had in the above-entitled matter before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Friday the 25th day of January, 1980, at the hour of 2:00 o'clock.

THE COURT: I think I have heard enough of what has probably been the best oral arguments I have had the pleasure of listening to from the various attorneys involved in this case. I think I have heard enough, in addition to having studied enough of the proposed plan of reorganization and the viable core and the Peat-Marwick study to reach a conclusion which I intend to announce concerning the matters that have been debated here today.

Preliminarily, though I find it disappointing in this focus on whether I should substitute my judgment for the Interstate Commerce Commission, and decline to forward a plan to them that the Commerce Commission is not represented here. I regret that fact and candidly don't quite understand it. They have been here on other occasions when their presence was much less helpful than it would be now.

Let me indulge in a little bit of reminiscence and history about the Rock Island since the fateful St. Patrick's Day when it first came to my attention.

I appointed as Trustee and attorney for the Trustee two gentlemen in whom I had a great deal of confidence and my confidence in them has never diminished, and I have over the years indulged their sincere hope and expectation of an income based reorganization of the Rock Island. I have admired the Trustee's resourceful efforts to achieve this, and I think with the creditors I shared his frustration, when an extremely difficult winter, and rising fuel cost, and disappointing traffic statistics intervened to really doom those efforts and to bring us to a state of cashlessness which we faced some several weeks ago. I have always indulged the hope of what I think is probably the gist of what I expressed before the Senate Committee that hongress [*sic*] would see its obligation if the public interest were really to served here, to address its attention to the Rock Island as it did to the Eastern Railroads which were the result of Con-Rail to the passenger service, with the result of Amtrak, and to the recent action to the Milwaukee, with sufficient help to bring about what I think was what Mr. Gibbons once described as Farm-Rail, which I thought was an excellent term to describe what I hoped we could achieve here. I watched the attempts of the Trustee and his counsel to sell off segments of the Rock Island, and have been disappointed, with one happy exception, there have been no tangible results from that activity, despite strenuous efforts.

I pushed Mr. Manos, in terms of timetable, in the filing of a plan of reorganization to the point where when I saw him on the street and noted his declining weight I had a severe attack of conscience because I was afraid I was driving him into bad health. I have listened to the Trustee for years through his counsel argue that I authorize and continue to be patient with the attempts to bring about a cash-based reorganization, based upon my finding of reorganizability. Mr. Manos argues in an abundance of emotion today that I should not decide that issue in four hours. I have in fact thought of very little else for four years. It has been the basic issue that I have confronted and the issue which I have had to decide over and over again as circumstances changed.

The concept of liquidation of a railroad means tremendous hardship, economic dislocation, the public interest has always been on the side of my hope of continued operation, if not in whole or at least in part of the Railroad. I have until now balanced the equities of the rights of the creditors against the public interest in favor of continuing operations. I have watched the Trustee do what I regard as a masterful job but it has not succeeded because success was not possible as somebody argued today, except under a set of perfect economic and social circumstances, and life being what it is that perfect set of circumstances never came to pass.

I have had an opportunity to go over the plan of reorganization. It is not a liquidation plan. It is a plan for reorganization of a proposed viable core. Liquidation is there only as an alternative possibility, as the creditors have argued, and the details of a plan of liquidation might be quite different than the details of a plan of reorganization, particularly in the area of priority and creditor's rights. So we have a basic reorganization plan which acknowledges the possibility of liquidation but is not a liquidation plan.

We went through a lot of travail, all of us, spent a lot of hours, missed a lot of dinner dates in constructing the framework for the final appointment of a Court's witness to determine the possibility of reorganizability. And we wound it up in the unusual position of having, because of the intervention of cashlessness, having to force the filing of a plan of reorganization at about the same time as we were completing a study as to the potential of reorganizability so that the plan and the Court's witness study reached me at approximately the same time.

I have studied the plan of reorganization, as I said, and I have studied the Peat-Marwick report, my own witness. I am satisfied that the witness that the parties recommended to me and whom I chose has done a fine job. It is a good study and I am compelled to accept its conclusions. This being so I am compelled also, if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success.

The Trustee is therefore instructed not to forward the plan of reorganization to the Commission. The Trustee is instructed to continue his present plans for cessation of operations by the time of the anticipated termination of the directed service order with the hope that that might be extended, and the Trustee is instructed to prepare and file with the Court a preliminary plan of liquidation by a date which I will let him pick since only he can tell me how much time he thinks is necessary for him to do that.

Before I finalize that order I would like to say that this ruling, in my judgment, means only that the final and inevitable decision that I have just made will have little effect on the public interest. It does now what would inevitably be done in a matter of a few months and it starts now rather than later the process of private sale and Commerce Commission reorganization of railroad service in order to patch together the best possible compromise between the public interests and the creditors' interests. And I guess it finalizes what will be the last chapter in the long and regrettably sad history of the Rock Island.

That will be the order based on the motion made today, and I would ask Mr. Manos, if you care to comment now or wish to reflect on it how much time you think it would take to prepare a liquidation plan which will be a modification I would guess of your reorganization.

MR. MANOS: Your Honor has not commented on the rebuttal to the PMM study that I placed —

THE COURT: I have not accepted your filing of the rebuttal of the PMM study. I decline to do so for the reason that I have read the PMM study. I have listened to comments on it today. I have indicated that in the main I accept it. I would expect that there might be some rebuttal of some aspects of it. I do not contemplate that in the main my conclusions based upon it and its conclusions would be changed. So that would be my ruling on that. I see no point to go into any extended debate on the PMM study.

MR. MANOS: Your Honor, I realize that in the Court's ruling that there be no extended debate, but may this be received then as an exhibit for today's hearing?

THE COURT: It may be received if you care to file it. I have no objection.

MR. JENNER: Your Honor, that is doing indirectly what he is not permitted to do directly.

THE COURT: Well the record reflects that I have made the decision, I haven't looked at it, it is an offer of proof, I guess. The decision has been made. Let's regard it as an offer of proof, it is something he would like me to consider. You may file it on that basis.

MR. MANOS: Your Honor, I do so only in placing before this Court what I consider to be the Trustee's discharge of its obligation to the Court to comment on the PMM study. I have not done so exclusively or with any degree of comprehension. The rebuttal is contained in the short statement which is paged, only nine pages.

Now, your Honor, you have already stated that without reading it you would not alter your decision and I accept your Honor's decision.

THE COURT: Let me explain why I say that. I don't want to appear unreasonable.

There comes a time in any course of events when the end in inevitable. The creditors would insist that I am long overdue in recognizing that fact. Be that true or not I do recognize it now. I think the possibility of a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part, I must inevitably conclude is just not possible and that is the basis of my decision. I must say that that decision was finally reached, or I was forced to it by a combination of the PMM study, my own witness, and I think a good one, and the arguments that I listened to today.

MR. MANOS: Your Honor, for that reason it would be a useless act and I withdraw this offer of proof.

THE COURT: Whatever you wish, counsel. . . .

APPENDIX D

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT
OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable FRANK J. McGARR

Cause No. 75 B 2697 Date February 27, 1980

Title of Cause In the Matter of Chicago, Rock Island and Pacific Railroad Company, Debtor.

Brief Statement of Motion _____

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

Representing _____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

Reserve space below for notations by minute clerk

Motion of Railway Labor Executives' Association to reconsider the order of January 28, 1980, is denied.

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 11, 1981

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*

No. 80-1353

APPEAL OF: RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Intervenor.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-B-2697 Frank J. McGarr, *Judge*

Unpublished Per Curiam Order

JUDGMENT — ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this court entered this date.

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* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

APPENDIX F

Statutes And Rules Involved

1. BANKRUPTCY ACT

Section 77, Reorganization of Railroad Engaged in Interstate Commerce, 11 U.S.C. §205

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.

The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission".)

When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof.

The petition shall be accompanied by payment to the clerk of a filing fee of $150.

Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied.

If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes therof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

Process of the court shall extend to and be valid when served in any judicial district.

The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them.

The railroad corporation shall be referred to in the proceedings as a "debtor."

Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor.

Creditors of any railroad corporation, having claims aggregating not less than 5 percentum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in which the corporation might file a petition under this section, a petition stating that the

corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 percentum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation.

The corporation shall, within ten days after such service, answer the petition.

If the answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismss the petition.

If such a petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section.

If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this Act or in any State or United States court.

If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of

the petition are sustained by the proofs, shall dismiss the petition.

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interest of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of in-

terest and alteration of other terms of such securities, the amendment of the charter of the debtor and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a class or classes of creditors. In case an

executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of the section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be

required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracts, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subsection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent

thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20(a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to

such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties, debts, or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalities, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of authorizing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(4) The judge shall require the officers of the debtor or the trustee or trustees at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and

refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized in accordance with the provisions of section 1 of the Interstate Commerce Act as amended, or until such operation pursuant to this paragraph is otherwise lawfully terminated. During any such operation, the lessor shall be deemed to be a carrier subject to all applicable provisions of the Interstate Commerce Act, as amended, and shall be entitled to receive just, reasonable, and equitable divisions of rates, fares, or charges applicable to the transportation of persons or property over its line or lines of railroad and the lines of the lessee or other carriers, and the provisions of section 15(6) of the Interstate Commerce Act, as now or hereafter amended, shall apply to said divisions whether or not joint rates covering such transportation have been established.

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or

trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan or reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

(10) The judge may direct the debtor or the trustee or trustees to keep records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commis-

sion a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganizing plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The circuit court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by

the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

. . . .

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of

dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

2. CHAPTER 8 BANKRUPTCY RULES

Rule 8-301. Formulation and Filing of Plan

(a) *First Filing of Plan.*

(1) *By trustee.* Within one year of approval of the petition or within any lesser period fixed by the court, the trustee shall file a plan with the court unless the court, after hearing on notice to such persons as the court may direct and for cause shown, extends the time within which a plan is to be filed. An application for an extension of time shall contain (A) the reasons why a plan cannot be formulated at that time, (B) a statement of the actions taken and intended to be taken in managing the debtor's estate, and (C) a summary of the debtor's operations and financial results. An extension shall not exceed one year.

(2) *By others.* If the trustee does not file a plan within the one-year period specified in paragraph (1) of this subdivision or within any lesser period fixed by the court, the court may, on application after hearing on notice to such persons as the court, may direct, grant to other parties in interest leave to file a plan.

(b) *Filing of Additional Plans or Modifications.* After the first filing of a plan but before transmission of the plan to the Interstate Commerce Commission under Rule 8-303, a party in interest may file another plan or a modification of a plan.

(c) *Copies to Interstate Commerce Commission.* A person filing a plan or modification of a plan shall furnish a copy thereof to the Interstate Commerce Commission.

(d) *Form of Plan.* Every proposed plan and any modification thereof shall be dated and identified with the name of the person or persons submitting or filing it.

Rule 8-303. Transmission of Plan to Interstate Commerce Commission

Not less than 30 days after the first filing of a plan under Rule 8-301, the court shall transmit all plans and modifications which have been filed with it to the Interstate Commerce Commission for filing with and consideration by the Commission.

Rule 8-310. Dismissal of Case

(a) *Dismissal.* The court may, after hearing on at least 20 days' notice to the debtor, creditors, stockholders, and indenture trustees as provided in Rule 8-209, dismiss the case if (1) a plan certified by the Interstate Commerce Commission is not approved pursuant to Rule 8-304 or not confirmed pursuant to Rule 8-307 and there is no remand of the proceeding to the Commission; (2) in light of all existing circumstances there is undue delay in the accomplishment of a reasonably expeditious reorganization; or (3) the Commission certifies that no plan can be formulated within a reasonable time. Before dismissing a Chapter 8 case for undue delay the court shall request the Commission to submit to the court a report and recommendation concerning dismissal of the case.

(b) *Notice of Dismissal to Creditors.* Promptly after entry of an order of dismissal under this rule, notice thereof shall be published and given to creditors, stockholders, and indenture trustees in the manner provided in Rule 8-209.

(c) *Revesting of Title.* A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to its property unless the order provides otherwise.

APPENDIX G

List of RLEA Member Organizations

American Railway Supervisors Association, Division of BRAC
American Train Dispatchers Associaion
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood of Railway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organizations of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Railway Employes Department, AFL-CIO
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; and THE INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION

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July 15, 1981

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No. 80-1899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; and THE INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION[1]

STATEMENT

The facts pertinent to these proceedings are fairly set forth in the Brief for the Federal Respondents in Opposition

[1]The Rock Island respondents are: William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company; Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island; The First National Bank of Chicago, as indenture trustee for the first mortgage bondholders; and Continental Illinois National Bank and Trust Company of Chicago, as indenture trustee for the income debenture holders. Parent companies, subsidiaries and affiliates of the Rock Island respondents are listed in the appendix hereto. The federal respondents are the Interstate Commerce Commission and the United States.

at pages 1-3 and in the opinion of the court of appeals (Pet. App. 1a-15a).[2]

ARGUMENT

1. This petition does not merit review by this Court because this case has no precedential value for any other railroad reorganization case. Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. §205, the statute under which this case was decided, has been repealed by the Bankruptcy Reform Act of 1978, 11 U.S.C. §§101, *et seq.* (Supp. III 1979). The new Code expressly provides for liquidation of a railroad under the aegis of a reorganization court. 11 U.S.C. §1174 (Supp. III 1979). The new Code also eliminates the role of the Commission in conducting hearings on plans of reorganization and reposes that function solely in the bankruptcy courts. 11 U.S.C. §§1161, *et seq.* (Supp. III 1979). Because the new Code applies to all railroad reorganizations filed after its effective date (October 1, 1979), *see* sections 402 and 403 of Pub.L. No. 95-598, 92 Stat. 2683, this case can have no precedential value for railroad reorganization proceedings brought under the new Code.

The petitioner does not dispute this absence of precedential value for future railroad reorganizations but argues instead that the decision in this case will impact on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road"), the only other Section 77 railroad reorganization pending in the Seventh Circuit. (Pet. 12.)[3] The court of appeals, however, ex-

[2]For a more complete narrative of these reorganization proceedings, the Rock Island respondents respectfully refer the Court to pp. 4-7 of their Motion to Affirm, filed December 17, 1980, in *RLEA v. Gibbons, appeal pending*, U.S., No. 80-415, and pp. 3-6 of their Motion to Affirm and Consolidate, filed February 18, 1981, in *RLEA v. Gibbons, appeal pending*, U.S., No. 80-1239.

[3]Two other Section 77 proceedings also pend in other circuits: *In re Boston & Maine Corp.*, No. 70-250-M (D. Mass.), in which a preliminary reorganization plan has already been filed; and *In re New York, Susquehanna & Western R.R.*, No. B-76-182 (D. N.J.), in which the trustee's plan of liquidation has already been approved by both the Commission and the reorganization court. Thus, the opinion in this case is of no precedential value in either proceeding.

pressly recognized that "each railroad in reorganization under Section 77 must be handled according to the unique circumstances of that debtor" (Pet. App. 14a), and therefore based its decision on the peculiar circumstances of the Rock Island. Presumably for that reason, the Seventh Circuit declined to publish the opinion in this case under its own Circuit Rule 35,[4] thus precluding reliance on this case as precedent for any other case within the circuit.

Even were the Rock Island case available as precedent for the Milwaukee Road reorganization proceedings, the two cases are sharply distinguishable. District Judge Frank J. McGarr, who has presided over the Rock Island's reorganization since its inception in March of 1975, issued his liquidation order against the background of continuing excessive losses, a crippling strike of employees and ultimately the cashlessness of his trustee. *See Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150 (1980). Liquidation of the Rock Island was favored not only by its creditors and shareholders, but also by the Department of Transportation, after consultation with the Commission (Tr., Jan. 23, 1980, at 23-31; Tr., Jan. 25, 1980, at 66-72), and by the Court's own independent expert witness, who testified that a successful reorganization structured upon a smaller core was not possible (Tr., Jan. 23, 1980, at 10-18). In the case of the Milwaukee Road, by contrast, neither the Department of Transportation nor the Commission has advocated liquidation, and the Milwaukee Road trustee continues to have the support of the reorganization court in his efforts to achieve a successful reorganization of the Milwaukee Road structured upon a smaller, viable core. Thus, the cases of the Rock Island and the Milwaukee Road are wholly dissimilar.

[4]Circuit Rule 35(b)(2)(iv) provides:

> Except to support a claim of *res judicata*, collateral estoppel or law of the case, [unpublished orders] shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

2. This petition does not merit review because the decision of the court below conforms with the decisions of this Court and of other courts of appeals. Petitioner argues that Section 77 of the pre-1978 Bankruptcy Act "does not give a railroad reorganization court the power to liquidate an estate" (Pet. 19); petitioner apparently would have this liquidation proceed through equity receiverships in each of the thirteen states in which the Rock Island has property. Petitioner overlooks the express language of Section 77(b), which states that a plan of reorganization may include provisions for the "sale of all or any part of the property of the debtor." (Pet. App. 32a.) Thus, Section 77 expressly anticipates that the disposition of all of the property of the debtor—*i.e.*, liquidation—is one possible method of reorganization. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 421 (1970). *Accord, In re Lehigh Valley Railroad*, 558 F.2d 137, 142-47 (3d Cir. 1977); *In re Huntingdon & Broad Top Mountain R. R. & Coal Co.*, 213 F.2d 411, 416-17 (3d Cir. 1954); *In re Penn Central Transportation Co.*, 395 F. Supp. 567 (E.D. Pa. 1975); *In re Tennessee Central Railway Co.*, 304 F. Supp. 789 (M.D. Tenn. 1969).

Indeed, the reorganization court's liquidation order not only conforms to prior decisions of this Court but it was constitutionally compelled. This Court has recognized that an unconstitutional taking of property occurs when a railroad is forced to continue operations after the public interest has been served for too long at the railroad's expense. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920). The reorganization court's order properly recognized "the basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision." *In re Central Railroad Company of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974).

Since the inception of the reorganization of the Rock Island, the bankrupt estate has suffered devastating losses and a crippling

strike of its employees that left the trustee cashless, with no prospect of a successful reorganization as an ongoing railroad even in the most favorable core configuration. *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150 (1980). As in the case of the New Haven Railroad, "[t]he public interest has had one huge bite at the apple; it is not entitled to another." *New Haven Inclusion Cases, supra*, 399 U.S. at 466, *quoting with approval, In re New York, New Haven and Hartford Railroad*, 304 F. Supp. 793, 801 (D. Conn. 1969).

Based upon a strained reading of *In re Lehigh Valley Railroad, supra*, 558 F.2d at 145, petitioner contends that the reorganization court erred by failing to take steps to assure the continuation of rail services before it issued its liquidation order. (Pet. 20.) But at the time Judge McGarr issued the liquidation order, rail service was continuing over Rock Island lines pursuant to the Commission's directed service order. I.C.C. Directed Service Order No. 1398, 360 I.C.C. 289 (1979). Furthermore, Judge McGarr refused to transmit the trustee's core plan of reorganization to the Commission precisely because he feared that the transmission of a nonviable plan to the Commission would delay the orderly disposition of Rock Island lines to other carriers, and thus would increase the risk of interruptions in rail service. (Tr., Jan. 25, 1980, at 98.)

The fact that the Rock Island cannot and will not continue as an ongoing railroad does not preclude the possibility that some of its lines will remain in rail use, owned and operated by solvent railroads. Indeed, the liquidation of the Rock Island and the disposition of viable lines to solvent rail carriers may offer the most realistic prospect of continuing those lines in rail service. To deny the Rock Island the auspices of Section 77—as petitioner apparently intends—and to insist that liquidation proceed under a series of common law equity receiverships, with all their attendant procedural complexities and confusion, is the surest way of inhibiting orderly disposition of Rock Island lines to other carriers and their continued use in rail service.

3. This matter has become moot. In the absence of any stay order, the liquidation of the Rock Island has continued. As petitioner now concedes (Pet. 12), there is no longer any prospect that the Rock Island can resume operations as an operating railroad.

Furthermore, no purpose would be served by now requiring the trustee to forward his first plan of reorganization to the Commission because the Commission has already approved the complete liquidation and abandonment of the Rock Island in its report of May 27, 1980. *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150 (1980). Under these circumstances, where both the reorganization court and the Commission have approved liquidation of the Rock Island, no conflict exists between the Commission and the reorganization court. The decisions of this Court in *Ecker* v. *Western Pacific Railroad*, 318 U.S. 448 (1943) and *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), upon which petitioner relies to urge referral of the plan to the Commission (Pet. 15-17), are therefore inapposite to this case. Section 77 does not require further consultation between the reorganization court and the Commission when both are already in agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 15, 1981

APPENDIX

Parent Companies, Subsidiaries and Affiliates

Parent companies, subsidiaries and affiliates of the Rock Island respondents are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R.R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R.R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R.R. Co.
Peoria Ry. Terminal Co.
Peoria Terminal Company
Pullman Railroad Company
Rock Island Improvement Co.
St. Paul Union Depot Co.
Trailer Train Company
Warren & Ouachita Valley Ry. Co.
Wichita Union Terminal Ry. Co.

B. The First National Bank of Chicago

Parent

First Chicago Corporation

Principal Subsidiaries

Network EFT, Inc.
International Commercial Bank Limited
N.V. Slavenburg's Bank

Principal Affiliates

First Chicago Cheque Corporation
First Chicago Trust Company of Arizona
First Chicago Realty Services Corporation
First Capital Corporation of Chicago
First Chicago Fiduciary and Investment Services Corporation
First Chicago Overseas Finance N.V.
First Chicago Financial Corporation
First Chicago Credit Corporation
Real Estate Research Corporation
First Chicago Lease Holdings, Inc.
UBAF Arab American Bank

C. Continental Illinois National Bank and Trust Company of Chicago

Parent

Continental Illinois Corporation

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)
Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation

Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1899

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, PETITIONER

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court, sitting as a railroad reorganization court under Section 77 of the pre-1978 Bankruptcy Act, 11 U.S.C. 205, may decline to transmit a reorganization plan to the Interstate Commerce Commission on the basis of its determination that the plan is not feasible.

2. Whether such a railroad reorganization court has the power to order liquidation of the railroad.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not reported. The opinion of the district court (Pet. App. 19a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1981. The petition for a writ of certiorari was filed on May 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1975, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") filed a petition for reorganization in the United States District Court for the Northern District of Illinois under Section 77 of the old Bankruptcy

Act, 11 U.S.C. 205.[1] In 1979, the Trustee of the Rock Island filed with the reorganization court a plan of reorganization that contemplated continued operation of a greatly reduced core railroad. Before forwarding the plan to the Interstate Commerce Commission, the court commissioned a study of the plan by an independent consultant (Pet. App. 4a).[2] The consultant concluded that the core operation proposed in the plan was not viable (*ibid.*). Based on its review of the consultant's report, the reorganization court directed the Trustee not to forward the reorganization plan to the Commission because it had "no hope of success" (*id.* at 21a). The court then instructed the Trustee to prepare and file a preliminary plan of liquidation (*id.* at 22a).

The court of appeals affirmed in an unpublished order (Pet. App. 1a-15a).[3] The court rejected petitioner's contention that a reorganization court "has no discretion whatsoever to aid in the efficient management contemplated by [Bankruptcy] Rule 8-303 by refusing to transmit a manifestly unfeasible plan to the ICC" (*id.* at 10a). In addition, the court of appeals emphasized that the reorganization court did not circumvent Commission involvement in either the reorganization or the liquidation process, noting that the Commission subsequently authorized the abandonment

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[1]Section 77 has been repealed by the Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.* The former Section 77 still governs cases commenced under that section before the effective date of the new code, such as the Rock Island bankruptcy at issue here. See Section 403 of Pub. L. No. 95-598, 92 Stat. 2683 (prec. 11 U.S.C. (Supp. III) 101 note). Unless otherwise indicated, all references herein will be to the old Bankruptcy Act.

[2]Bankruptcy Rule 8-303 requires the court to retain a plan of reorganization for not less than 30 days before transmitting it to the Commission for consideration (Pet. App. 44a), and Section 77(d), 11 U.S.C. 205(d), contemplates a Commission proceeding to consider the transmitted plan (Pet. App. 41a-42a).

[3]The United States and the Commission did not participate in the appeal.

of all of the Rock Island's lines because there was no realistic hope for reorganization or continued service (Pet. App. 11a). The court of appeals also held that liquidation may appropriately be undertaken in connection with a railroad reorganization under Section 77 (*id.* at 12a-14a).

ARGUMENT

1. Petitioner contends (Pet. 11-17) that the reorganization court's failure to forward the reorganization plan to the Commission violated Section 77. Whatever the merits of this contention, it does not merit review by this Court because no practical purpose would be served thereby. The liquidation of the Rock Island has not been stayed during the appellate proceedings in this case, and even petitioner admits (Pet. 12) that, in light of the progress of the liquidation, there is now little prospect that the Rock Island will ever resume its own operations. Requiring the Trustee now to forward its reorganization plan to the Commission would be a futile exercise.

Moreover, the issue of statutory interpretation presented here is of no continuing importance because of the repeal of Section 77. All railroad reorganizations filed in the future are subject to the rules of the Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.*, which does not require submission of a reorganization plan to the Commission. Thus, there are only two pending proceedings under Section 77, which were initiated before the effective date of the new Bankruptcy Act, in which this issue could possibly arise.[4]

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[4] *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, No. 77-B-8999 (N.D. Ill.); *In re Boston & Maine* Corp., No. 70-250-M (D. Mass). Liquidation has already commenced in another Section 77 proceeding following approval of the Trustee's plan of liquidation by both the Commission and the reorganization court. *In re New York, Susquehanna & Western R.R.*, No. B-76-182 (D.N.J.).

In any event, petitioner's contention (Pet. 16-17) that *Ecker* v. *Western Pacific R.R.*, 318 U.S. 448 (1943), implies that the reorganization court infringed the Commission's jurisdiction by not forwarding the reorganization plan is mistaken. In *Ecker*, this Court concluded that the former Bankruptcy Act divided the power to reorganize railroads between the bankruptcy courts and the Commission. But here the reorganization court's action did not usurp the Commission's powers because the Commission did not dispute that there was no hope for a reorganization of the Rock Island. In May 1980, in response to the Trustee's abandonment application, the Commission determined that " 'abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity' " (Pet. App. 6a). For this reason, the Commission did not oppose the reorganization court's determination that the reorganization plan was without merit.[5] Moreover, the Commission's role, contemplated in *Ecker*, of protecting the public interest will be maintained here by the Commission's review of the liquidation plan and supervision of the liquidation process.[6]

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[5]After the Commission recommended abandonment in May 1980, the reorganization court authorized the abandonment. While formerly only the Commission could authorize rail line abandonments, Section 17 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 915, provided that pending Section 77 railroad reorganizations will be subject to the provision of the new Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 1170, allowing courts to authorize abandonment of lines of bankrupt railroads after obtaining a report from the Commission.

[6]*In re Boston & Maine Corp.*, 484 F. 2d 369 (1st Cir. 1973), does not necessarily conflict with the decision of the court below. In *Boston & Maine*, the court of appeals specifically noted (*id.* at 372) that it could not say "that the prospects of reorganization [were] so dim" that the reorganization court could decide on its own whether a railroad could be reorganized. In contrast to the instant case (see pages 2-3, *supra*), the Commission there was of the view that the railroad could be reorganized successfully.

2. Petitioner contends (Pet. 18-19) that the reorganization court had no authority to order liquidation of the Rock Island because authority to liquidate railroads is conferred on such courts only by the Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.*, not Section 77. This argument highlights the lack of future significance of the questions presented here. Moreover, the court of appeals correctly held that Section 77 contemplates liquidation as a form of reorganization.

Section 77(b), 11 U.S.C. 205(b), explicitly provides that a court may order, subject to the approval of the Commission, the "sale of all * * * the property of the debtor" railroad (Pet. App. 32a). This section clearly contemplates the possibility that the railroad will not be reorganized. See *New Haven Inclusion Cases*, 399 U.S. 392, 420 (1970). Thus, it has generally been recognized that a liquidation may proceed under Section 77 once it has been determined that a railroad is not reorganizable on an income basis. See generally *In re Lehigh Valley R.R.*, 558 F. 2d 137, 141-147 (3d Cir. 1977).[7] The decision of the court of appeals facilitates an orderly process for the liquidation of the Rock Island subject to the supervision of the Commission under former Section 77(d) of the Bankruptcy Act—a process that has previously been found to be workable in the Section 77

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[7]Contrary to petitioner's suggestion (Pet. 20), no court has held that liquidation under Section 77 may proceed only if it is clear that the bulk of the railroad's property will continue in railroad use. The amount of property that will continue in railroad use is necessarily a function of whether willing purchasers exist, a factor that ought not affect a court's authority under Section 77. In any event, petitioner's concern (see Pet. 14) that the Rock Island's property will not be continued in rail use is premature. Since the reorganization court authorized the Rock Island to abandon all of its lines in June 1980, several railroads have filed with the Commission for permission to purchase and operate some of the abandoned lines; thus, much of the Rock Island's property may indeed continue to be used as a railroad in the future.

proceeding of the New York, Susquehanna and Western Railroad Company. See note 4, *supra*. This process is fully in accord with this Court's decision in *Ecker* v. *Western Pacific R.R., supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

DOJ-1981-06